No. 11919

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioners,

vs.

O'KEEFE AND MERRITT MANUFACTURING COMPANY AND L. G. MITCHELL, W. J. O'KEEFE, MARION JENKS, LEWIS M. BOYLE, ROBERT J. MERRITT, ROBERT J. MERRITT, JR., AND WILBUR G. DURANT, Individually and as Co-partners, Doing Business as PIONEER ELECTRIC COMPANY,

Respondents,

and

UNITED STEELWORKERS OF AMERICA, STOVE DIVISION, LOCAL 1981, C.I.O., and PHILLIP MURRAY, Individually and as President of the UNITED STEELWORKERS OF AMERICA, C.I.O.,

Intervenors.

ON PETITION FOR ENFORCEMENT WITH MODIFICATIONS OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

BRIEF OF RESPONDENTS.

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BRIEF OF RESPONDENTS.

Preliminary Statement.

The record in this case was made almost three years ago. [R. I., 220.] Exactly one month prior to the start of the hearing, on February 6, 1946, the C. I. O. had filed a Charge with the Board office for the Twenty-first Region in Los Angeles which referred back to a Board-conducted election on November 20, 1945 [R. I., 1]; determination of representatives pursuant thereto was dated November 20, 1945.

As stated in Petitioner's Brief on pages 4 and 5, O'Keefe and Merritt, the corporation, and Pioneer Elec-

tric, the partnership, had been operating since 1920 and 1942 respectively, each with a substantial force of employees, and each doing a business of approximately $2,000,000 per annum [R. III, 1268], in contiguous portions of the same factory premises in Los Angeles. The election, as always, followed the filing of a representation petition with the Board, and it is apparent that, at some time prior to the election, someone had had to make a decision as to which employer to name in that petition.

The Charge recites glibly that the election determined and the Board certified the C. I. O. as the representative of the production and maintenance employees of both the corporation and the partnership. [R. I, 1.]

But at the time the Charge was written the prior decision above mentioned had predicated a far different result. The difficulty so created was not alone for the C. I. O. in drawing the Charge. It carried over to the Board in drawing the Complaint and the Amended Complaints, the findings in the Trial Examiner's Intermediate Report, and the findings in the Decision and Order of the Board. In each of these the Board has attempted to maintain the inevitable *non sequitur* which attempts are, in our view, conspicuous both for their ingenuity and their lack of success.

The facts are in the record. Since the record as a whole does not support either the Board's findings nor Statement of the Case in its Brief, we would like to run over them, using the same abbreviations as have been used by the Board.

Though it is hard to deduce from anything filed anywhere by the Board, the statement of the Charge referred

to above is wholly untrue. As to representation of the employees of the corporation *and* the copartnership:

1. The C. I. O. never petitioned for it. [R. II, 750.]

2. The A. F. of L. never consented to it. [R. III, 973.]

3. The Board never gave notice of any such election. [R. III, 1221.]

4. The Board never procured any employee lists of both firms. [R. III, 1217, 1218.]

5. The tally of ballots shows that no such election was ever held. [R. III, 1226.]

6. The consent determination of representatives does not purport to effect any such result. [R. III, 1230.]

7. The certification on conduct of election refers to no such election. [R. III, 1002.]

In the face of the obvious fact that both the C. I. O. and the Board avoided wholeheartedly and at all times the commission of any act or acts which might effect or tend in any way to effect a determination of bargaining representatives for the partnership, the Pioneer Electric Company, we find the Board saying in the Complaint, Paragraph 8 [R. I, 7], that the election of November 20, 1945, *from which Pioneer Electric Co. and its employees were purposely excluded* [R. II, 912, to R. III, 913 to 947, inclusive—testimony of the C. I. O. leader, John Despol—after a recess he attempted to change this testimony to the effect that he had confused Pioneer Electric with a trucking company R. III, 948, *et seq.*], determined representatives for the partnership, Pioneer Electric.

The first amended charge [R. I, 22] repeats the statement that the election determined representatives for the partnership as well as the corporation. The Amended Complaint [R. I, 12] alleges in Paragraph 8 that the election determined representation for the corporation only, but in Paragraph 9 charges both the corporation and the partnership with refusal to bargain with the C. I. O.; elsewhere the Amended Complaint attacks the A. F. of L. contract as having been made when the A. F. of L. was not the duly designated exclusive bargaining agent of "respondents" employees. This contract was dated in February, 1946. [R. I, 19.]

The Second Amended Complaint [R. I, 24] is dated February 20, 1946, but appears to have been filed March 13, 1946, one week after the start of the hearing, which was on March 6, 1946. Its date is also one day before the date of filing of the First Amended Charge, February 21, 1946. Like the first Amended Complaint, entitled and sometimes called herein "Amended Complaint," it charges that the election affected the corporation only, but that "respondents," meaning the corporation *and* the partnership, have refused to bargain with the C. I. O., and that "respondents" have coerced their employees and entered into the A. F. of L. contract when the A. F. of L. was not the duly designated bargaining representative of "said employees." This document, like the previous complaint, describes the proper bargaining unit as consisting exclusively of O'Keefe and Merritt employees, *i. e.*, employees of the corporation only.

The Trial Examiner, in his Intermediate Report, was faced with a record which showed that the partnership, from its inception in 1942, had been at all times conducted

as a separate entity in all respects. "In all respects" means everything from Social Security accounts to Workmen's Compensation insurance. [R. III, 1261-1265.] There was an entire absence of evidence from which the two respondents could be coupled as general and special employer with respect to the employees of either. The record did show a transfer of approximately 300 employees from the corporation to the partnership about January 31, 1946. [R. I, 72.] The eligibility list for the election, composed entirely of employees of the corporation, numbered 341. [R. I, 75.] Confronted with this situation the Trial Examiner concludes that the corporation and partnership "are jointly employers of the employees here involved" and recommends that the C. I. O. shall receive the right to bargain for the partnership employees and that all of them, those coming to the partnership on January 31, 1946, and those who were employees before that time, shall be divested of their contract with the A. F. of L.

In the Decision and Order of the Board [R. I, 176] the majority does not find joint employment but "that there is a considerable community of interest between the two respondents." "* * * the burden was upon the respondents to separate the two, viz., to show that the lease and transfer would in any event have taken place absent the illegal motivation." [R. I, 180.]

The minority opinion noted the following significant facts: 1. That as early as 1944 the C. I. O. was debating whether to include the partnership in the unit. 2. That in their 1945 petition the C. I. O. sought a unit of corporation employees only. 3. That the election was held in a reconversion period which returned production to the article already under pre-war boycott by the A. F.

of L. 4. "It is conceded that one of the reasons for the transfer was that under O. P. A. regulations the partnership respondent could obtain higher prices for its products because it was a new producer in the field." [R. I, 186, 187.]

In view of our contention, made heretofore to the Board, that the uncorroborated evidence of Charles Spallino is insufficient as substantial support of a finding, we desire to examine petitioner's account of his first meeting with Daniel O'Keefe. (Petitioner's Brief, 7.) Petitioner states that on this occasion Charles Spallino and Lovasco "were in the office of Daniel O'Keefe, president of the corporation." Quite true, and they were there at Charles Spallino's instance. [Testimony of Lovasco, R. IV, 1535.] According to Charles Spallino, Daniel O'Keefe said that in the event he had to make a choice he would favor the A. F. of L. and directed them to Cecil Collins, attorney for the corporation. But according to Lovasco, who was there, Daniel O'Keefe never mentioned Collins' name [R. IV, 1537], and told them to keep their noses clean.

Next in order, Petitioner's Brief has the two men in Cecil Collins' office a few days later. Charles Spallino testified to this meeting as set forth in Petitioner's Brief, page 8, but according to Lovasco, nothing occurred except that Collins refused to help Charles Spallino write a speech. [R. IV, 1538-1542.]

Next, Petitioner's Brief tells of Charles Spallino meeting Roberts of the Stove Mounters, A. F. of L. and trans-

acting business concerning signature cards. Their activities have one significance in view of Charles Spallino's testimony that Cecil Collins knew about them, but quite another in connection with Lovasco's testimony that they were unknown to management of either the corporation or the partnership. [R. IV, 1542.]

There is sufficient evidence that Charles Spallino was a C. I. O. agent, both at the time he was pretending to organize for the A. F. of L. and at the time he testified in the hearing of this case.

> "Like I said before, in the past we fought labor unions of all kinds. We didn't have to have any unions. Then came the decision on having the labor union. We decided which one we wanted. I got the one I wanted, and I am sticking by it." [R. III, 1260, testimony of Charles Lovasco.]

At the time of these pretended A. F. of L. activities with alleged connivance of management, Charles Spallino was passing out C. I. O. literature in the toilets. [R. III, 1252-1260.]

There is evidence that Charles Spallino was connected with the C. I. O. at the time of their original organizing drive in 1944. [R. II, 596.]

His own testimony characterizes him as a hypocrite:

> "Q. (By Mr. Collins): Mr. Spallino, were you at any time in good faith working for the A. F. of L.?
> (Objections overruled.)
> A. Not in good faith, no." [R. II, 604.]

Returning to Petitioner's Brief: In connection with these alleged organizing activities of Charles Spallino which he says were not in good faith, petitioner recites that he made a demand for an increase in salary. He was visiting various departments during working hours, and the record shows that this was required as the Christmas season approached in connection with his regular duties as president of the social Five and Over Club. [R. II, 575.] In this connection Petitioner's Brief, page 11, cites the following significant quotation, ascribed to Cecil Collins: "If you want to better yourself, you are working with * * * (the plant superintendent) there, he could easily give you a nickel or a ten-cent raise." [R. II, 490.] Why this ponderous attempt by deletion to leave the impression that Cecil Collins was talking about a managerial bribe instead of a mere brotherly favor? The name deleted is that of Joe Spallino, the witness' brother.

Next, Petitioner's Brief has Charles Spallino and Lovasco going to Daniel O'Keefe and submitting "to him for approval a pro A. F. of L. document evidently inspired by Collins." This is the document which Lovasco testified Collins had refused to inspire, and the authorship of which he ascribed to himself and Charles Spallino. When the speech was taken to Daniel O'Keefe, one thing is clear from all accounts—he promptly threw it in the waste basket. [R. IV, 1538.]

Next come the speeches. As to the content of these there is no question, and all of them, the three by Daniel

O'Keefe and the one by Cecil Collins, are in the record. They are distorted in Petitioner's Brief.

As to the speeches before the Five and Over Club on or near the day of the election there is no evidence they were inspired by either management, either union, nor that those attending were paid for their time by anyone. Charles Spallino merely testified no deduction was made in his own pay, which is not surprising since it is clear from the record that he generally pursued all his duties as president without deduction for the time spent. Certainly a part, and perhaps all, of the corporation's employees were off work at the time of the meeting. No mention is made in the record of the partnership employees. [R. II, 510, 511, 512.]

As to the bargaining relations between the corporation and the C. I. O. after the election, Despol, the C. I. O. leader, admitted his error in excluding the partnership from the election [R. IV, 1544, 1545] threatened Lovasco with dire consequences. [R. IV, 1543.] It was only about a month before the transfer and lease between the corporation and the partnership, and there were several meetings during this period, necessarily inconclusive, and after the transfer Despol would not continue unless the corporation bargained for the partnership employees. [R. IV, 1558 *et seq.*]

ARGUMENT.

It is the position of respondents that no substantial evidence of unfair labor practices is in the record aside from the speeches. That these speeches do not violate the Act. That the order with modification as requested by the Board is not justified in view of the position of the C. I. O. on compliance, and that its entry would merely permit the C. I. O. to bargain with the Court *re* compliance. That there is no foundation for entry of an order against Pioneer Electric and no due process as to certain of its partners.

I.

NO JURISDICTION WAS ACQUIRED BY THE BOARD AS TO CERTAIN RESPONDENTS.

II.

PIONEER ELECTRIC WAS AT ALL TIMES A SEPARATE ENTITY NOT AFFECTED BY ANY DETERMINATION OF REPRESENTATIVES AND NO ORDER SHOULD BE MADE AGAINST IT OR ITS CONTRACT.

III.

THE ONLY PROPER RESPONDENT EMPLOYER WAS NOT GUILTY OF UNFAIR LABOR PRACTICE.

IV.

SECTION 9(H) OF THE ACT, AS AMENDED (29 U. S. C. A., SECTION 159(H)), IS CONSTITUTIONAL.

V.

IF ANY PORTION OF THE ORDER BE ENFORCEABLE, THE BOARD'S REQUESTED MODIFICATION THEREOF IS TOO LIMITED IN SCOPE.

POINT I.

No Jurisdiction Was Acquired by the Board as to Certain Respondents.

Clearly, an order of the Board, to be valid and enforceable, directing an individual to do or not to do certain acts, must be based on jurisdiction over the person of such individual. To enforce such an order as to such an individual would contravene and be contrary to the due process of law clause of the Fifth Amendment of the United States Constitution in the absence of acquisition by the Board of personal jurisdictional over that indivdual.* Petitioner makes no contrary contention but does contend that personal jurisdiction was had as to each respondent and therefore that the order validly may be enforced against each. In support of this contention, the Board argues that jurisdiction was had over the person of each individual both by service in accordance with Section 11(4) of the Act (29 U. S. C. A. Sec. 161(4)) and by general appearance entered on behalf of each. (N. L. R. B. Brief, pp. 88-92.) The arguments made are submitted to be without support.

The Act provides for several methods of service among which is service by registered mail. The latter was the method attempted by the Board. In the absence of general appearance, proof of service by this means requires

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*No contention is made by respondents that jurisdiction was not had over the corporation and over the partnership. The order, however, purports to run against each partner as an individual though certain were never properly served with requisite notice.

affidavit by the individual making the service and a return post office receipt. This dual requirement obviously is for the purpose of showing actual receipt by the named individual of the required notice, etc., so as to acquire personal jurisdiction and afford that individual an opportunity to be heard and to defend. Otherwise due process of law is not had and fundamental constitutional requirements are violated. (*Powell v. Alabama,* 287 U. S. 45, 68.)

Signature upon the return receipt by the very individual involved probably suffices to establish actual receipt by that individual of the requisite process to acquire jurisdiction and respondents here make no claim to the contrary. However, as admitted by the Board (p. 89), certain of the return receipts here were signed, not by the individuals involved, but by some third person. Though the Board characterizes the actual signer in such case as the "agent" of the individual intended to be served, there was and is nothing to substantiate this assertion. May personal jurisdiction be acquired in this unreliable way?

For example, in the case of respondent Jenks, she had moved to Hawaii where she was working at the time process was delivered by mail and signed for in Los Angeles, California. The return post office receipt was signed, not by her, but by some third person. She was not served with nor did she receive any notice personally. Surely, Congress did not intend that a return receipt, signed by a third person and not by the party, would establish and support personal jurisdiction over the party. The

fundamental right to notice with opportunity to appear and defend before any determination of the party's valuable rights and privileges cannot thus be taken away without constituting a denial of due process of law. The individual respondents, such as respondent Jenks, who were not served in conformity with requirements of due process of law, cannot be said to be bound by the Board's order here petitioned to be enforced. As to such respondents, the order is a nullity.

The Board contends that any defect in service was cured by general appearance. On the opening day a week's continuance was ordered of the hearing, no testimony being taken. At that time, the Trial Examiner asked all counsel to state orally the appearances for his benefit. At the same session, Mr. Collins informed the Examiner that the continuance would enable him to contact the individuals ("clients") "and see whether I represent them and find out who I represent" [R. I., p. 272], having previously informed the Examiner that some had not yet been served. [R. I., p. 254.] Certainly, these oral statements cannot be said to constitute any general appearance by those individuals who had not been served and who had not even had opportunity to converse or confer or even contact counsel. A week later, at the outset of the day to which continuance had been had, Mr. Collins informed the Examiner that he had been unable to communicate with respondent Jenks and with other respondents, that he did not know which ones had been served, and that he was not

purporting to appear for or represent any respondent who had not been served but only such as had been served. [See R. I., pp. 286-290.]

The Board also refers to the written answer filed as constituting a general appearance by the corporation, partnership and each individual partner. This pleading is entitled "Answer of Respondents" and commences with "Comes now the respondents in the above-entitled matter, and, for answer to the complaint, first amended complaint and second amended complaint on file herein, admit, deny and allege as follows" [R. I., p. 38.] Where there are several defendants, a pleading filed for "defendants" generally, without naming them, constitutes an appearance only for those who have been served with process and does not constitute an appearance for defendants not so served. (*Swafford v. Howard,* 20 Ky. L. 43; *Crump v. Bennett,* 2 Litt. (Ky.) 209; *Mullins v. Rieger,* 169 Mo. 521; *Dougherty v. Shown,* 1 Helsk. (Tenn.) 302; *Williams v. Neth,* 4 Dak. 360; *Correl v. Grieder,* 245 Ill. 378; *Phelps v. Brewer,* 9 Cush. (Mass.) 390; *Heavrin v. Lack Malleable Iron Co.,* 153 Ky. 329; *Merced County v. Hicks,* 67 Cal. 108. *Cf. Thompson v. Cook,* 20 Cal. 2d 564.)

The order of the Board is invalid and cannot be enforced as to those respondents, such as respondent Jenks, over whose person no jurisdiction was secured.

II.

Pioneer Electric Was at All Times a Separate Entity Not Affected by Any Determination of Representatives and No Order Should Be Made Against It or Its Contract.

The petitioners, in their brief, have relied upon a number of cases based upon factual situations unlike the one in the present case. The partnership respondent was a bona fide firm, in existence since 1942. It engaged in the manufacture of war materials, as a sub-contractor, during World War II, had its own employees, and was a distinct, separate legal entity from the corporation. Nowhere does the record show it was an organization formed as a subterfuge by the corporation for the purpose of refusing to negotiate with the C. I. O.

The petitioners have relied upon cases in which corporations have made changes and/or mergers "in name only." But here the record shows the contract between the corporation and the partnership had been in contemplation between the contracting parties long before the consent election and no "in name only" subterfuge was engaged in.

Where the two organizations are actually separate entities, that the courts will require conclusive proof of actual fraud before reaching the conclusion urged by the petitioners herein is shown by the language of the Circuit Court of Appeals in *N. L. R. B. v. Timken Silent Automatic Co.,* 114 F. 2d 449, where the court says:

> "The motion by the Timken-Detroit Axle Company rests on wholly different grounds. *Although the original respondent was its wholly owned subsidiary,* there is no showing here made which gives sufficient ground for disregarding the separate corporate existence of the two. No control by the parent may

be said to have wronged or defrauded anyone with whom these proceedings are concerned and without proof of that sort of dominance the parent stockholder is not to be treated as one with the subsidiary corporation. (Citing cases.) Nor does an agreement to assume and discharge the obligations of the subsidiary operate as a merger of the two. Whatever rights and obligations may arise from that *fall short of making the two corporations one entity in law and that alone is of present importance.*" (Emphasis added.)

In the cases cited by the petitioners, including *DeBardeleben v. N. L. R. B.,* 135 F. 2d 13; *N. L. R. B. v. Hopwood Retinning Co., Inc.,* 104 F. 2d 302; *N. L. R. B. v. Blair Quarries, Inc.,* 152 F. 2d 25; *N. L. R. B. v. Adel Clay Products Co.,* 134 F. 2d 342; *Southport Petroleum Co. v. N. L. R. B.,* 315 U. S. 100, and others, there was in no instance a merger with a bona fide, pre-existing organization. In no instance do the facts of these cases coincide or even approach the situation of this case, where the partnership has a valid, closed shop contract in effect prior to the transfer of employees from the corporation.

In *N. L. R. B. v. Blair (supra),* cited by petitioners, Blair (who took over the Granite Co.), operated with the same personnel, and "assumed the operation without change of personnel or in manner of doing business." This situation must be clearly distinguished from the case herein where the partnership operated with its own personnel and union contract prior to the transfer.

In *N. L. R. B. v. Long Lake Lumber Co., et al.,* 138 F. 2d 363, the "separate entities" were a lumber company and one Robinson, who had a contract with the company

to log standing timber owned by the company, said contract terminable on thirty days' notice.

The above cases fail to disprove the contention of the respondents herein; that the partnership, as a valid and separate entity, which prior to any of these proceedings had its own employees, working under a contract with the A. F. of L. unions herein, entered into prior to the transfer of employees, is not to be bound by any ruling concerning the corporation, a distinct and independent organization.

POINT III.

The Only Proper Respondent Employer Was Not Guilty of Unfair Labor Practice.

Elsewhere in this brief it is shown that O'Keefe and Merritt Manufacturing Company, a corporation, was the employer as to whose employees the election for exclusive representative was had and that neither the partnership, Pioneer Electric Company, nor the individual partners of the latter as employers or otherwise had any connection therewith and that the choosing of an exclusive bargaining representative, for the employees of the partnership, was never requested nor involved in any election. It is shown that the Board's Order improperly and without right seeks to direct the partnership and individual partners thereof to cease and desist from certain acts and to take other affirmative actions upon the basis and assumption that the election held by the employees of the corporation, O'Keefe and Merritt Manufacturing Company, is to be binding and effective against the separate entity, Pioneer Electric Company, a copartnership, and its individual partners as such. It is shown that the Board's Order properly may bind and affect only the corporation,

its officers and agents. The question thus arises whether the evidence establishes any unfair labor practice by this respondent corporation, its officers or agents.

What constitutes unfair labor practice for an employer? Section 8 of the Act (29 U. S. C. A., §158), both before and after amendment, contains five subdivisions defining this matter. It is provided:

> "It shall be an unfair labor practice for an employer—
>
> "(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.
>
> "(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.
>
> "(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided (proviso not here important).
>
> "(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under sections 151-166 of this title.
>
> "(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

These, then, constitute those matters which, if violated by the employer, would be unfair labor practice.

Mr. O'Keefe, president of respondent corporation, delivered a speech to the employees of the corporation prior to the election. In its brief, the Board has quoted portions of this speech and summarized other portions as establishing unfair labor practice by respondent corporation. The entire speech appears in Volume III of the Record at pages 1087 through 1094. It is filled with statements demonstrating lack of any unfair labor practice. Mr. O'Keefe stated:

> "I realize that selecting a union to bargain for you is your own affair and for this reason, I have not interfered with the activities of the different groups who have been active in organizing for the different unions. However, some of the old timers around here asked me to express my views, inasmuch as they thought I had an opportunity to evaluate the different unions and pass this information along to the men. I suppose that some of you will feel that I am butting in but, after all, I am expressing my opinion and when it comes to voting, the ballot is secret—you can suit yourselves.
>
> "First of all, I can say that I still think all unions are bad—the A. F. of L. as evidenced by the trouble they caused in the moving picture strike—the C. I. O. for the many disturbances they have created in the short period of time they have been in existence, and while there are probably some good men connected with both unions, nevertheless I think a lot of them want to make a living without doing any work themselves. But that is not the issue now. The question for you to decide is which of the two, let's say evils, is the lesser or will there be more benefits from one than from the other."

Mr. O'Keefe then compared the promises which each union had made to the employees during their compaigns, and continued:

> ". . . As you know, the A. F. of L. tried to organize us a long time ago. We opposed it then on the grounds that they did more harm than good. I am not sure today whether or not that is still true, for the reason that I do not know how much trouble they will cause us. However, if they allow you to have your own local and you select the right men to head that local, I believe you can keep some of those who might be inclined to cause trouble from rocking the boat and get along harmoniously without work stoppages, which are a bugbear as well as a loss to management and employees."

Mr. O'Keefe then commented that the company had never been able to do much business in the northern part of the state because the men who connect stoves in that territory belonged to A. F. of L. and stated that "Another reason that I would be partial to the A. F. of L., if I were an employee voting, is the fact that we are so closely identified with the building trades," predominantly A. F. of L. His speech concluded with the following:

> "Now on the ballot there are three places to vote—one for the C. I. O., one for the A. F. of L., and one for neither. I can just imagine that there are a number of you who would be very glad to vote for neither, but I want to ask you as a favor to pass this up and vote for one or the other. The fact that you vote for one or the other does not mean that you will have to join that particular union or any union, but it does mean that you are going to have one or the other in here to bargain for you if you wish to join. And as you know, nobody is going to know

how you vote—we will get along as best we can with whomever you select to represent you, as I believe you will always use good judgment in selecting your representatives. Therefore, again I urge you to be sure and vote."

A reading of the entire speech [R. III pp. 1087-1094] shows there was no unfair labor practice thereby committed. It was an exercise of Mr. O'Keefe's right to freedom of speech. In *Big Lake Oil Co. v. N. L. R. B.,* 146 F. 2d 967, the employer posted a letter to its employees, prior to an election, quite similar in content to Mr. O'Keefe's speech. The Board contended that this was an unfair labor practice. The Court held:

> "We do not agree with the Board that the letter written by petitioner's vice president and general manager to its various employees was coercive. We think the letter was informative rather than coercive, and contained statements that the employer has a right to make. As said by this court in Jacksonville Paper Company v. National Labor Relations Board, 5 Cir., 137 F. 2d 148, 152:
>
> " 'The Act does not take away the employer's right to freedom of speech. The constitutional right of freedom of speech can not be so abridged as to preclude an employer from expressing his views on labor policy or problems so long as such utterances do not, by reason of other circumstances, have a coercive effect on employees.' "

The Board's cease and desist order was enforced, however, because of other activities of the employer which constituted unfair labor practice.

In *N. L. R. B. v. J. L. Brandeis & Sons,* 145 F. 2d 556, is found:

> "It is the contention of the petitioner that notwithstanding the constitutional guaranty of the right of free speech preserved by the First Amendment to the Constitution, respondent as an employer 'had the affirmative duty of maintaining a complete and unquestioned neutrality.' While the teaching of some of the earlier decisions appears to sustain the contention that an employer must be neutral in his attitude in all labor matters and must refrain from expressing his opinion, we think the case of National Labor Relations Board v. Virginia Electric & Power Co., 314 U. S. 469, . . . marks a definite departure from that view, and the trend of judicial decision since the Virginia Power Company case supports the view that an employer may disseminate facts within the area of dispute, may even express his opinion on the merits of the controversy even though it involves labor organization, may indicate a preference for individual dealings with employees, may state his policy with reference to labor matters, and may express hostility to a union or its representatives. (Citing many cases.) This right of free speech guaranteed by the constitutional amendment extends to labor matters and the dissemination of facts. (Citing case.) It is only the use of the right free speech in labor matters under such circumstances and conditions as to coerce the will of employees that is forbidden. (Citing cases.)"

The petition for enforcement was denied.

In *N. L. R. B. v. American Tube Bending Co.,* 134 F. 2d 993, the Court also refused enforcement of the Board's Order. In the very recent case of *N. L. R. B. v. Enid Co-operative Creamery Ass'n,* 169 F. 2d 986, the respond-

ent employer posted a notice prohibiting any union discussions or activities whatsoever while on duty. The notice went on to state "we want our employees to know that it is not necessary to belong to any union to work for this Association, neither is it necessary to refuse to belong to a union to work for this Association. This is a question for each employee to decide for himself without pressure or prejudice from the union or the employer." The Board declared this to be an unfair labor practice and sought enforcement of its Order by the Court. In refusing to grant enforcement, the Court held concerning the notice:

> ". . . We can find nothing either overtly or covertly inimical in this statement. *Cf.* N. L. R. B. v. Virginia Electric & Power Co., 314 U. S. 469 . . .; Boeing Airplane Co. v. N. L. R. B., 10 Cir., 140 F. 2d 423; N. L. R. B. v. American Tube Bending Co., 2 Cir., 134 F. 2d 993, . . .
>
> "The course of conduct of the respondent's supervisory employees relied upon by the Board to support enforcement, consists of statements by them to employees during the union's campaign to organize the plant. The statements were made to various employees at their homes, on the street, and wherever they happened to meet. They were undoubtedly calculated to persuade the employees not to join the union. Thus, they were told that they would derive no benefit from joining a union; that the wages they were being paid were higher than the wages paid in similar plants; and that if the employees were unionized they might have to take a reduction in salary; that if they joined the union and failed to pay their dues they would be discharged, and other 'disadvantages' of union membership were pointed out. But,

there is no evidence of any direct or subtle threats of coercion. No one was led to believe that membership in the union would affect his employment in any way, and there is no evidence whatsoever that membership in the union or membership activities prejudiced any employee.

"The Act proscribes interference, restraint and coercion—it does not proscibe 'free trade of ideas.' N. L. R. B. v. Virginia Electric & Power Co., *supra;* Thomas v. Collins, 323 U. S. 516, . . . The Board has a wide latitude in appraising facts and drawing inferences therefrom. It has the primary responsibility for the administration of the Act and to that end, the right and duty to determine when facts constitute unfair labor practices. But we, along with the Board, have the duty to balance the employer's inalienable right of free speech and expression against the right of the employees to freedom of self-organization. See N. L. R. B. v. Continental Oil Co., 10 Cir., 159 F. 2d 326. In that process, we have said that so long as persuasion does not amount to coercion, it is within the guaranty, but that when words of persuasion are uttered by one who holds the power of coercion, it is often difficult to attain the delicate balance between the two. N. L. R. B. v. Continental Oil Co., *supra*. If, however, an employer has the right not only to inform but to persuade to action, see Thomas v. Collins, *supra,* he surely may tell an employee that, in his judgment, it would not be beneficial for him to join a union if he also makes it plain that such employee has a free choice without fear of reprisal.

"Judged by this test, we are convinced that the statements relied upon by the Board are wholly insufficient to warrant enforcement."

The pre-election speech of Mr. O'Keefe under the decisions cannot, it is submitted, be characterized as an unfair labor practice. The Board states that respondent corporation donated the services of two rank and file employees who proselytized for the A. F. of L. Even the statement of facts, somewhat distorted in favor of the Order, contained in the Board's Brief, states that when the "rank and file" employee approached an employee he would tell the latter that they had to join a union, the A. F. of L., "that is that the Company wanted the A. F. of L., *but at election time they could vote the way they wanted.*" (Board's Br. p. 9.) The activities and statements made by the supervisory employees in the *Enid Cooperative Creamery Ass'n* case, *supra,* were far stronger than those here involved. And, as in that case, there here has been no showing that the acts were coercive or contained any threat of force or reprisal or promise of benefit. This being so, the Board cannot successfully uphold its Order upon the premise that the pre-election speech or other activities amounted to an unfair labor practice. And, while not conclusive, it may be pointed out that the employees actually voted for the C. I. O. and not A. F. of L. according to the certification of the Board.

The Board next characterizes a speech, made by Mr. O'Keefe a week after the election, as an unfair labor practice. This speech appears in full in Volume III of the Transcript at pages 1095 through 1105. The Board's Brief deals most unfairly with the spirit and content of this speech. The speech is lengthy and should be read in

its entirety. It was made after the election and hence could have had no effect thereon. It was merely a statement of what the employer could now expect in the way of business dealings under the choice made by the employees and the problems which the result had raised. There was no threat of coercion or reprisal or promise of any benefit. There was an expression of disappointment. But nothing therein, it is submitted, may be characterized as an unfair labor practice.

The Board asserts that respondent corporation, through Mr. Collins, its attorney and labor relations adviser, failed to bargain in good faith with the chosen union after its certification. The facts stated by the Board in its brief are that five bargaining conferences were held (approximately one a week for five weeks) but that Collins endeavored to evade bargaining. The Board states that throughout the negotiations the union sought a "union shop" contract but that Collins was willing to consider only maintenance of membership and check-off provisions. It is clear that the parties were unable to reach a basis and that such is the prime reason for failure to reach an agreement. The Board intimates that the respondent corporation secretly was negotiating with the separate entity, the partnership (concerning which the CIO had failed and refused to include in the election), for a transfer to the latter of its manufacturing facilities. There was no secret concerning this proposed transfer, the union representative being informed that the transaction was pending at the third conference if he was not aware there-

of prior to that time. This transfer was not a spur of the moment transaction but was a bona fide transaction between separate entities as elsewhere shown in this brief. It was not for the purpose of evading or negating the certified union as the bargaining unit for the employees of the respondent corporation.

The respondent corporation has been and still is willing to bargain with the CIO regarding the corporation's employees. However, the CIO refuses to bargain for such employees unless the employees of the separate entity, the partnership, are included. It is submitted that, in the absence of an election by and proper certification of the CIO for the partnership's employees it manifestly is improper for the union to insist upon exclusive representation for such employees. The respondent corporation could not, if it desired, bargain with those who are not its employees.

Finally, the Board refers to a speech made by Mr. Collins, a few days after Mr. O'Keefe's second speech, and to a third one made by Mr. O'Keefe. The former appears in Volume III of the Transcript at pages 1115 through 1117 while Mr. O'Keefe's appears in the same volume at pages 1106 through 1109. It is submitted that neither contains anything which may be characterized as an unfair labor practice as defined in the Act. (See, for example, *N. L. R. B. v. Crompton-Highland Mills, Inc.*, 167 F. 2d 662, quoted and followed in *N. L. R. B. v. Penokee Veneer Co.*, 168 F. 2d 868.)

It respectfully is submitted that the Order of the Board cannot be supported for the reason that no unfair labor practice was proven against respondent corporation.

POINT IV.

Section 9(h) of the Act, as Amended (29 U. S. C. A., §159(h)), Is Constitutional.

The "Brief for Intervenors"—United Steelworkers of America, Stove Division, Local 1981, CIO, and Philip Murray, Individually and as President of the United Steelworkers of America, CIO—is confined to a lengthy and repetitious discussion contending that the statute (Section 9(h) of the Act, as amended (29 U. S. C. A., §159(h)), is unconstitutional. Due to the extremely short time between the receipt of Intervenors' Brief by respondents' counsel and the due date, as extended, of the instant brief, it has been impossible to read and study each of the numerous citations made by intervenors or to fully digest or to give thorough consideration to each of the many arguments advanced in Intervenors' Brief.

Intervenors apparently contend that Section 9(h) is presumed to be unconstitutional for they argue (pp. 68 *et seq.*) that "The burden of establishing that Section 9(h) is constitutional is upon the Board." However, it is settled beyond cavil that a statute, enacted by the Legislative branch of the Government, is presumed to be constitutional, all doubts must be resolved in favor of upholding the statute and in favor of its constitutionality, and no statute will be declared unconstitutional unless and until the one attacking its constitutionality clearly establishes that it contravenes some constitutional provision. (11 Am. Jur., §§128 *et seq.*, pp. 776 *et seq.; Carmichael v. Southern Coal & Coke Co.,* 301 U. S. 495, 509-510; *Helvering v. Davis,* 301 U. S. 619, 640-641.)

Counsel for intervenors, Messrs. Goldberg and Donner, appeared as counsel for certain petitioners in the case of

Inland Steel Co. v. N. L. R. B., C. C. A. 7th, decided September 23, 1948 (cases numbered 9612 and 9634), 170 F. 2d 247, 263-267. (On November 24, 1948, certiorari was applied for by the union—United Steelworkers of America v. N. L. R. B.; and on November 26, 1948, certiorari was applied for by Inland Steel Company —Inland Steel Co. v. N. L. R. B.) Many, if not all, of intervenors' contentions here made were likewise advanced in the *Inland Steel Company* case wherein the Circuit Court of Appeal upheld the constitutionality of Section 9(h). The majority opinion upon the constitutionality of Section 9(h) was written by Kerner, C. J., and concurred in by Minton, C. J. In upholding the statute it was held:

> "The Union's principal contention is that the condition imposed by the Board's order and the Congressional policy embodied in §9(h) which the order effectuates, invade the right to freedom of speech and deny freedom of political belief activity. It insists that §9(h) 'is an attempt to restrict freedom of belief'; that the section 'is primarily if not exclusively a restraint upon opinion and belief,' and that it 'imposes sanctions for the alleged evil of harboring "dangerous thoughts."'
>
> "In support of its contention the Union cites among others the cases appearing in the margin.* A study of these cases discloses that in them the court was concerned with the effect of legislation, or judi-

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*These were: *Stromberg v. California*, 283 U. S. 359; *DeJonge v. Oregon*, 299 U. S. 353; *Herdon v. Lowry*, 301 U. S. 242; *Schneider v. State*, 308 U. S. 147; *Cantwell v. Connecticut*, 310 U. S. 296; *Bridges v. California*, 314 U. S. 252; *West Virginia State Board of Education v. Barnette*, 319 U. S. 624; *Murdock v. Pennsylvania*, 319 U. S. 105; *Thomas v. Collins*, 323 U. S. 516; and *Saia v. New York*, 334 U. S. 558.

cial action, which imposed a prior restraint upon speech, press or assembly, or which restricted the occasion for permissible exercise of speech, press or assembly, or which punished the individuals for having published their views.

"It is to be borne in mind that the Act was not passed because Congress disapproved of the views and beliefs of Communists, but because Congress recognized that the practices of persons who entertained the views presently to be discussed, might not use the powers and benefits conferred by the Act for the purposes intended by Congress, so, in my view, the question is whether Congress, by providing that the facilities of the Board shall not be available to a labor organization unless each of its officers shall file an affidavit with the Board that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, does not belong to, or support any organization believing in or teaching the overthrow of the United States Government by force or by any illegal or unconstitutional methods, violated the Constitution.

"It is to be remembered that neither belief, nor speech, nor association is the subject matter of the policy of §9(h) and that neither that section nor the Board's order imposes any limitation upon what any labor leader might think or say, nor does the order or §9(h) attempt to prohibit or restrain anyone from joining or supporting any organization. Neither the order nor §9(h) denies to Communists the right to speak and to publish freely their views, beliefs and opinions. They may speak as they think. There is no invasion of political rights. Communists are not denied the right to continue to remain members of the Communist Party. The section does not make

such affiliation or beliefs punishable either criminally or by the imposition of civil sanctions. In such a situation the cases cited by the Union are inapplicable and hence not controlling here, but as was said in National Maritime Union v. Herzog, 78 F. Supp. 146, 163, 'It is therefore clearly wrong to say that §9(h) impinges on a union officer's freedom of speech.'

"It is unquestioned that Congress may conclude the policies of the Act, *i. e.*, stimulation of commerce and the security interests of the nation would be deterred by an extension of the benefits of the Act to labor organizations dominated by officers who are Communists or supporters of organizations dominated by Communists, and that it may take steps to effectuate its conclusions. It fact the 'congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principal is that the power to regulate commerce is the power to enact "all appropriate legislation" * * *. That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." ' National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 36. Nevertheless, the Union contends that §9(h) contravenes the guarantees of the Ninth and Tenth Amendments. It insists that the instant case involves more than a regulatory measure, and it argues that if the statute is viewed as one 'restricting expression of advocacy,' it fails to meet the clear and present danger rule.

"While it is true that 'a law applied to deny a person a right to earn a living or hold any job because of hostility to his particular race, religion, beliefs, or because of any other reason having no rational relation to the regulated activities,' cannot be supported under the Constitution, Kotch v. Board of River Port Pilot Commissioners, 330 U. S. 552, 556, yet Congress has the power to withhold benefits which it confers for the accomplishment of legitimate purposes within its constitutional powers from those who, it has cause to believe, may utilize those benefits for directly opposite purposes. For example, in Turner v. Williams, 194 U. S. 279, it was held that Congress could properly make the privilege of immigration turn upon the political beliefs of the immigrant, and in United Public Workers v. Mitchell, 330 U. S. 75, it was held that in the exercise of its power to promote the efficiency of the public service, Congress could properly bar from public employment persons who exercised their constitutional right to engage in political activity. And in Oklahoma v. Civil Service Commission, 330 U. S. 127, 143, it was held that Congress in the exercise of its powers to 'fix the terms upon which its money allotments to states shall be disbursed,' could constitutionally deny allotments to states which refuse to remove from their payrolls employees who engaged in political activity. See also *In re* Summers, 325 U. S. 561; Hamilton v. Board of Regents, 293 U. S. 245; Havker v. New York, 170 U. S. 189; Clarke v. Deckebach, 274 U. S. 392; and Kotch v. Board of River Port Pilot Commissioners, *supra*. And where factors relevant to the

attainment of legitimate legislative policies are shown, their use as a basis for distinction is not to be condemned. Hirabayashi v. United States, 320 U. S. 81, 101.* That being so, I think it well to inquire whether there are factors reasonably related to the attainment of the objectives which Congress sought to promote.

"Unquestionably, the Labor Management Relations Act, 1947, 61 Stat. 136, was designed to lessen industrial disputes. This purpose is clearly shown in the declaration of policy, §1(b) of the Act, and in the amendment to the findings and policies contained in §1 of the National Labor Relations Act.

"Prior to the passage of the National Labor Relations Act, employers were free to discharge employees for joining labor organizations, and to refuse to bargain collectively with labor organizations which represented their employees. And it is clear that when Congress enacted that Act it sought to minimize strikes in industries affecting commerce by promoting the process of collective bargaining as a practice conducive to friendly adjustments of disputes over wages, hours and working conditions between employers, and employees. In doing this, Congress im-

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*Counsel for respondents in the present cause also call attention to the following language from the *Hirabayashi* case, p. 100: "The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process. *Detroit Bank v. United States,* 317 U. S. 329, 337, 338, and cases cited. Congress may hit at a particular danger where it is seen, without providing for others which are not so evident, or so urgent. *Kockee Consol. Coke Co. v. Taylor,* 234 U. S. 224, 227."

posed new obligations upon employers and provided administrative machinery for the enforcement of those obligations, but it did not impose those duties because it was under a constitutional obligation to employees or labor organizations to do so. On the contrary, the statute was enacted solely because Congress deemed the imposition of these duties desirable as a means of protecting the public interest in the free flow of commerce, but the benefits of the Act could not be extended to shield concerted activities which Congress had not intended to protect, National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240; Southern Steamship Co. v. National Labor Relations Board, 316 U. S. 31, and any benefit which employees or labor organizations derived from the enforcement of these public rights was entirely incidental to the public purposes which enforcement was designed to achieve. True, under the Act, the Board acts in a public capacity, but not for the adjudication of private rights; rather it exists to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining. The entire scheme of the statute emphasizes this point and the Supreme Court has so held, National Licorice Co. v. National Labor Relations Board, 309 U. S. 350; Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177; and National Labor Relations Board v. Indiana & Michigan Electric Co., 318 U. S. 9.

"Before enactment of §9(h), hearings were conducted by Congressional committees which showed that Communists did not view labor unions primarily as instrumentalities for the attainment of legitimate economic aims; that certain practices of some labor organizations whose officers were members of or

supporters of the Communists Party tended to foment industrial unrest and strife; and that these practices were inimical to the purposes for which the protection of the Act had been granted. From the evidence thus produced and considered Congress believed that Communists and their supporters and persons who advocated the violent overthrow of the Government, when they attain positions of power and leadership in a labor organization might not practice collective bargaining as a method of friendly adjustment of employer-employee disputes, but instead might use their position as a vehicle for promoting dissension and strife between employers and employees, and that Communists and their supporters and persons who advocate violent overthrow of the Government, if in control of labor organizations, might provoke strikes disruptive of commerce, not for the purpose of improving the economic lot of union members, but to develop political power to achieve political ends, and hence, Congress, in the exercise of its discretion, concluded that extension of the benefits of the Act to such labor organizations would not serve to promote the policies of the Act, but might endanger national interests. The reasonableness of that conclusion was for Congress to determine, North American Co. v. Securities & Exchange Commission, 327 U. S. 686, 708, and since there existed a substantial basis in fact for the conclusion reached by Congress, it seems to me that it was rational for Congress to conclude that members of the Communist Party or persons affiliated with such party who believe in and teach the overthrow of the United States Government by force or by any illegal or unconstitutional method were more likely than others to misuse the powers which inhere in union office. Hence, I conclude that Congress acted within its constitutional powers.

"The point is made that the section is invalid because the phrases 'any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods,' 'affiliated with,' and the word 'supports' are vague and indefinite and must fall before the First, Fourth and Fifth Amendments. For the reasons set forth in National Maritime Union v. Herzog, *supra,* I think the contention lacks merit. In addition, I believe that the statute is as specific as the nature of the problem permits, compare Dunne v. United States, 138 F. 2d 137, 143. Moreover, the language is not so vague that men of common intelligence would have to guess at its meaning and differ as to its application. It requires only that persons who knowingly engage in the activities set forth in §9(h), or who knowingly believe in the enumerated doctrines, or who knowingly support organizations which disseminate such doctrines shall not obtain access to the machinery set up by Congress for the purposes of advancing a specific public policy; hence if an affiant honestly believes that he is not affiliated with the Communist Party, that he does not support any organization which to his knowledge teaches the overthrow of the United States Government by means which he knows to be illegal or unconstitutional, such an affiant would be in no danger of conviction under Sec. 35 (A) of the Criminal Code, 18 U. S. C. A. §80. Compare United States v. Gilliland, 312 U. S. 86, 91; Screws v. United States, 325 U. S. 91, 101-105. See also United States v. Petrillo, 332 U. S. 1.

"The point is made that §9(h) is a bill of attainder, because, so it is said, the section proceeds not by way of defining a harmful activity and setting up sanctions against such activity, but by way of a legis-

lative declaration of the guilt of individuals and groups with respect to engaging in such activities.

"In my opinion this contention is unsound. A bill of attainder is a legislative act which inflicts punishment without a judicial trial. Cummings v. The State of Missouri, 71 U. S. 277, 323. Section 9(h) does not rest upon any finding of guilt, but like the disqualification of convicted felons from medical practice in Hawker v. New York, *supra,* and the disqualification of aliens from operating poolrooms in Clarke v. Deckebach, *supra,* it operates not to impose punishment but to safeguard important public interests against potential evil. And as was said by Mr. Justice Murphy, 'nothing in the Constitution prevents Congress from acting in time to prevent potential injury to the national economy from becoming a reality.' North American Co. v. Securities & Exchange Commission, *supra,* 711.

. . . . . .

"Minton, C. J., concurs in this opinion."

Respondents here have quoted the majority opinion in the *Inland Steel Company* case, *supra,* for the reason that it sets forth the answers to Intervenors' arguments here made through the same counsel.

The constitutionality of the section also was considered by the court and upheld in *National Maritime Union of America v. Herzog,* 78 Fed. Supp. 146, which additionally upheld §9(f) and §9(g) of the Act. On appeal, the Supreme Court affirmed the decision in upholding (f) and (g) of §9, but stated that "We do not find it necessary to reach or consider the validity of section 9(h)." (*National Maritime Union of America v. Herzog,* 68 S. Ct. 1529.) However, respondents respectfully

direct the Court's attention to the decision of the District Court (statutory three-judge court) in its full and complete consideration of the arguments advanced by Intervenors respecting §9(h).

In *Wholesale & Warehouse Workers Union, Local 65 v. Douds,* D. C., So. Dist. N. Y., being Civil numbers 46-157 and 46-405, decided June 29, 1948, by a statutory three-judge court, 15 Labor cases, CCH, 64,609, the majority of the Court held: "Finally, we sustain the constitutionality of §9(h) for the reasons set forth at length in the majority opinion in *National Maritime Union v. Herzog, supra.*" (On November 8, 1948, the Supreme Court noted jurisdiction in this cause under the name *American Communications Assn. v. Douds,* ..... U. S. .....) In *Osman v. Douds,* D. C., So. Dist. N. Y., Civil No. 46-729, the same statutory three-judge court on October 20, 1948, adhered to its decision in the *Wholesale & Warehouse Workers Union* case, *supra,* and again upheld the constitutionality of section 9(h) of the Act. (An appeal to the Supreme Court was filed in the *Osman* case on November 9, 1948.)

Thus in every case found, thus far considering the constitutionality of §9(h), the statute has been upheld. Indeed, the Congress would have been remiss in its duty to the People had it not taken some measure to protect the United States Government from the discovered potential danger. As was said in *Barsky v. United States,* 167 F. 2d 241:

> "Moreover, that the governmental ideology described as Communism and held by the Communist Party is antithetical to the principles which underlie the form of government incorporated in the federal Constitution and guaranteed by it to the States, is

explicit in the basic documents of the two systems; and the view that the former is a potential menace to the latter is held by sufficiently respectable authorities, both judicial and lay, to justify Congressional inquiry into the subject. In fact, the recitations in the opinion of the Supreme Court in Schneiderman v. United States, 1943, 320 U. S. 118, are sufficient to justify inquiry. To remain uninformed upon a subject thus represented would be a failure in Congressional responsibility."

The grant by Congress to a labor organization to be certified and thereafter to be the *exclusive* representative of the employees, even those not belonging to the organization, is not a fundamental or constitutional right. It is but a privilege granted by the Congress. After an intensive investigation, Congress discovered that many officers in labor organizations belonged to subversive groups which sought, not the legitimate advancement of the economic aims of the members of the labor organization, but the weakening or overthrow of the United States Government through any means including misuse of their powers as officials of the labor organization. The investigation revealed that the Communist Party was the largest and strongest of this group. For the protection of the United States Government and for preventing these union officers from misusing their powers and hence cause strife and disturbance in the field of labor relation, the Congress determined that the privilege to be certified and to act as exclusive bargaining representative—with the enforcing arm of the Government behind these privileges—should be withheld from those unions whose officers could not or would not take an oath as prescribed. Certainly, this is not only proper but Congress would have failed in its

duty had it not enacted such a statute. Similar oath has not only been required and upheld in other fields (see *Steiner v. Darby,* 88 Cal. App. 2d ....., 88 A. C. A. 487, citing, discussing and relying upon *Arver v. United States,* 245 U. S. 366; *United States v. Macintosh,* 283 U. S. 605, 624, *et seq.; Christal v. Police Commission,* 33 Cal. App. 2d 564, 567, *et seq.; Communist Party v. Peek,* 20 Cal. 2d 536; *Hayman v. City of Los Angeles,* 17 Cal. App. 2d 674; *McAuliffe v. Mayor etc. of City of New Bedford,* 155 Mass. 216*), but the requirement of taking oath as a prerequisite to securing a privilege or license, such as to practice law, even though the required oath would be contrary to the religious beliefs of the applicant for the license, has been held proper. (*In re Summers,* 325 U. S. 561.)

While *N. L. R. B. v. Edward G. Budd Mfg. Co.,* 169 F. 2d 571 (cert. applied for on November 13, 1948), did not involve the constitutionality of §9(h) of the Act, it did involve the constitutionality of portions of the Labor Management Relations Act of 1947. Many of the arguments

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*Opinion by Mr. Justice Holmes. A petition for mandamus to restore petitioner to office of policeman was before the Court. Petitioner had been removed because he violated a rule which read: "No member of the department shall be allowed to solicit money or any aid, on any pretense, for any political purpose whatever." The Court stated, "There was also evidence that he had been a member of a political committee, which likewise was prohibited." The Court held: "It is argued by the petitioner that the mayor's finding did not warrant the removal; that the part of the rule violated was invalid, as invading the petitioner's right to express his political opinions; . . . One answer to this argument . . . is that there is nothing in the constitution of the statute to prevent the city from attaching obedience to this rule as a condition to the office of policeman, and making it a part of the good conduct required. The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

there made are the same as those here advanced by Intervenors. The Court held:

> "The Foreman's Association contends that §§2 (3, 11), and 14(a) of the amended Act, 29 U. S. C. A., §§152(3, 11) and 164(a), are unconstitutional as attempting to authorize employers to abridge the fundamental rights secured to supervisory employees by the First Amendment of the United States Constitution. This contention is based upon the assumption that the guarantees of freedom of speech, and of the press, and right of assembly, contained in the First Amendment include the right of employees to be affirmatively protected in their organizational activity against employer interference; that such protection afforded by the National Labor Relations Act is a constitutional right; and that Congress has no right to withdraw this protection by the provisions of the amended Act. We do not agree with this contention. The right of employees to form labor organizations and to bargain collectively through representatives of their own choosing with employers has long been recognized. N. L. R. B. v. Jones & Laughlin Steel Corporation, 301 U. S. 1, 33, 34, . . . This right is protected by the Constitution against *governmental* infringement, as are the fundamental rights of other individuals. But prior to the National Labor Relations Act no federal law prevented *employers* from discharging employees for exercising these rights or from refusing to recognize or bargain with labor organizations. The National Labor Relations Act created rights *against employers* which did not exist before. N. L. R. B. v. Jones & Laughlin Steel Corp., *supra*. Such rights, however, were not private rights vested in the employees but were public rights protected by the power placed by the Act in the Na-

tional Labor Relations Board. Amalgamated Utility Workers v. Consolidated Edison Co., 309 U. S. 261, . . .; National Licorice Co. v. N. L. R. B., 309 U. S. 350, 362, 363, . . .; Phelps Dodge Corporation v. N. L. R. B., 313 U. S. 177, 192, 193 . . . There is nothing in the amended Act which restricts freedom of speech on the part of supervisory employees. Section 14(a) of the amended Act specifically reserves to them the right to join a labor organization. The rights guaranteed by the First Amendment are not interfered with. The amended Act merely changes the statutory method of enforcing those rights. What Congress gave by the original Act in the way of enforcement provisions was pursuant to the policy determined by Congress at that time, which it was privileged to change by a later exercise of such power when and if it seemed advisable to it that such policy be changed. The argument to the contrary would deny to Congress the right to repeal the Act in its entirety after it was once placed in the statutes in 1935. Such legislation does not create vested rights with respect to transactions in the future.

"The Foreman's Association further contends that §§2(3, 11) and 14(a) of the amended Act are based upon arbitrary classification with resulting discrimination against supervisory employees and so violate the Fifth Amendment of the Constitution of the United States. . . . It is equally well recognized that Congress has broad discretion in making statutory classifications, that such a classification is not

invalid if it bears a reasonable relation to the purposes of the legislation, that legislative classification is presumed to rest on a rational basis if there is any conceivable state of facts which would support it, and that the courts will not inquire into the necessity of such classification if it is not patently irrational and unjustifiable. (Citing numerous cases.) There are numerous instances of valid legislation which has clasified and exempted certain types of employees from the provisions of the legislation being enacted. . . .

"We do not agree with the further contention that the supervisory employees have been deprived of a property right in violation of the Fifth Amendment or that the Amendment is akin to a bill of attainder, designed to punish, as in United States v. Lovett, 328 U. S. 303, . . . We have already pointed out that the rights created by the original act are public rights, not private rights. There is no vested right in individuals to have the rules of law remain unchanged for their benefit. (Citing cases.) A proceeding by the Board is in the public interest, and is remedial and preventative, rather than punitive in its nature. (Citing cases.) . . ."

It is respectfully submitted that the provisions of Section 9(h) of the Act, as amended (29 U. S. C. A., §159 (h)), are valid and constitutional, being within the legislative powers of the Congress.

POINT V.

If Any Portion of the Order Be Enforceable, the Board's Requested Modification Thereof Is too Limited in Scope.

In its petition for enforcement, the Board has requested that certain modifications be made and incorporated in its Order. If any portion of the Order be enforceable, it is submitted that the requested modifications, as made by the Board, are too limited in nature and scope.

1. The Requested Modification of Paragraph 1(a).

As originally made, the Order directs respondents to cease and desist from: "Urging, persuading, warning, or coercing their employees to join" certain named organizations; "encouraging membership in any of the above named organizations; and discouraging membership in United Steelworkers of America, Stove Division, Local 1981, CIO, or any other labor organization of their employees." [R. I., p. 182—par. 1(a) Order.] The Board has requested [R. I., p. 202] that this portion of the Order be modified by adding thereto only the italicized words in the following portion: "Urging, persuading *or* warning *by threat of reprisal or force or promise of benefit* or coercing their employees to join", the remaining portions to continue unchanged. This modification was requested "in order to conform with the requirements of Section 8(c) of the Act, as amended." [R. I., p. 202.]

The Board's requested modification does not cause paragraph 1(a), in the event it is to be enforced, to comply with said Section 8(c) of the Act (29 U. S. C. A., §158 (c)). This section permits the employer and also any labor organization to express and disseminate any views,

argument, or opinion, "if such expression contains no threat of reprisal or force or promise of benefit", and expressly states that such shall not constitute or be evidence of unfair labor practice. Yet, under the language of paragraph 1(a) of the Order, if modified only as requested by the Board, respondents would be directed to cease and desist from "encouraging membership" and "discouraging membership" without any qualification thereof. In order to cause paragraph 1(a) of the Order to comply with the Act, the entire paragraph, it is submitted, should be qualified by adding to the end thereof the following: "Provided that nothing in the above shall prevent the expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, if such expression contains no threat of reprisal or force or promise of benefit."

2. Failure to Request Modification of Paragraphs 1(b) and (c) and 2(a).

The Board has not requested any modification of paragraphs 1(b) and (c) and 2(a) of the Order. In the event these, or any of them, are to be enforced, it is submitted that certain modifications properly should be made.

So long as paragraphs 1(b) and 2(a) are definitely limited to requiring the proper respondents from recognizing or dealing with the named labor organizations "as the *exclusive* representatives" for all the employees, such would be proper, if to be enforced herein. Paragraph 1(b) seemingly recognizes this throughout. But the same may not be said for paragraph 2(a). The latter, as was done in 1(b), it is submitted, should be modified by adding the word "exclusive" before the word "representatives" in the last

phrase thus causing this phrase to read "certified by the National Labor Relations Board as the exclusive representatives of such employees."

Paragraph 1(c) of the Order, if enforceable, would without modification prevent effect being given to *any* contract between the employer and the IAM or AFL organizations even though the CIO local and parent organizations cannot be bargained with as exclusive representatives due to their failure and refusal to comply with Section 9(h) of the Act and the failure of the local to comply with Section 9(f) and (g) of the Act. It is submitted that this portion of the Order, if enforceable, should be modified to permit effective contractual relationship between the employer and the IAM and AFL organizations so long as exclusive bargaining with the CIO local and parent organizations is not required by reason of failure to comply with Section 9(f), (g) and (h) of the Act.

3. The Requested Modifications of Paragraphs 1(d) and 2(b) and 2(c).

As originally made, the Order directs respondents to cease and desist from refusing to bargain with Local 1981, CIO, as exclusive representative [R. I., p. 183—par. 1(d) Order], directs respondents upon request to bargain collectively with said Local 1981, CIO, as execlusive representative [*id.*—par. 2(b) Order], and to post a certain prescribed notice [*id.*—par. 2(c) Order]. In its petition for enforcement, the Board requests that certain modifications be made of these paragraphs of its Order. [R. I., pp. 203-204.] One modification thus requested is to condition enforcement of paragraphs 1(d) and 2(b) upon compliance by said Local 1981, CIO, within 30 days of

the Court's decree, with Sections 9(f) (g) and (h) of the Act (29 U. S. C. A. Sec. 159(f) (g) and (h)), and to condition enforcement of paragraph 2(c) upon compliance by said Local 1981, CIO, and any national and international labor organization of which it is an affiliate or constituent unit, within 30 days of the Court's decree, with Sections 9(f) (g) and (h) of the Act. (29 U. S. C. A. Sec. 159(f) (g) and (h).)

Subsequent to the filing of the Board's Petition for enforcement, said Local 1981, CIO, and the national labor organization filed their motion to intervene herein. The pleading alleges that the Local 1981, CIO, has not complied with Section 9(f) and (g) of the Act, though the reports and statements there mentioned properly are required by law. The Local 1981, CIO, states that it will comply with these requirements of the law *after* decree of this Court. This bargaining with the Court, offering to comply with statutory requirements after decree made, is submitted to be improper. Compliance with law by the Local should not be dependent upon securing a decree, favorable or otherwise, from the Court.

The ninth paragraph or allegation of the Motion to Intervene states: "Neither the officers of the United Steelworkers of America, CIO, nor the officers of Local 1981, United Steelworkers of America, CIO, have complied with Section 9(h) of the Act, as amended, nor will said officers comply." Thus, both the Local and the National organizations expressly and without equivocation state that neither will comply with Section 9(h). (29 U. S. C. A. Sec. 159(h).) In view of this positive, express and unequivocal position by the labor organizations, it is submitted that paragraphs 1(d) and 2(b) and 2(c) of the

Order should not be modified, as suggested by the Board, but that these paragraphs should be deleted entirely therefrom. Since the Local and National both avow that they will *not* comply with Section 9(h), there is no ground or reason for conditioning enforcement of these paragraphs upon the doing of that which each positively states will not be done. It therefore is submitted that these paragraphs, i. e., 1(d), 2(b) and 2(c), of the Order should be deleted therefrom and enforcement of these paragraphs denied under the circumstances.

If, despite the foregoing conditions, the Court be of the opinion that these three paragraphs are to be enforced with such a time condition attached, it should be noted that the modifications, as requested by the Board, are too limited in scope and nature.

As originally made, the Order directs respondents to cease and desist from "Refusing to bargain collectively with United Steelworkers of America, Stove Division, Local 1981, CIO, as the exclusive representative of all production and maintenance employees" etc. [R. I., p. 183—par. 1(d) Order.] It thus is seen that the paragraph refers only to the local union organization and does not refer to nor include reference to any national or international labor organization of which it is an affiliate or constituent unit. The Board has requested [R. I., p. 203] that this portion of its Order be modified by adding after the words "CIO" the phrase: "If any (and?) when said labor organization shall have complied within thirty (30) days from the date of the decree enforcing this order, with Sections 9(f), (g) and (h) of the Act, as amended." However, Sections 9(f), (g) and (h) require compliance therewith not only by the local union organization but also

by any national or international labor organization of which it is an affiliate or constituent unit. (29 U. S. C. A. Sec. 159(f), (g) and (h).) Hence, the requested modification made by the Board is too limited in nature and scope and the paragraph, if to be enforced, it is submitted, should be modified not only to refer to compliance by the local CIO organization but also to compliance by "any national and international labor organization of which it is an affiliate or constituent unit."

As originally made, the Order directs respondents to: "Upon request, bargain collectively with United Steelworkers of America, Stove Division, Local 1981, CIO, as the exclusive representative of all production and maintenance employees' etc. [R. I., p. 186—par. 2(b) Order.] The Board has requested [R. I., p. 203] that this portion of its Order be modified by inserting after the words "Upon request" the following phrase: "And upon compliance by the Union with the filing requirements of the Act, as amended, in the manner set forth above." Here again, the modification would refer expressly only to the "Union"—local in nature—and would not include any national or international labor organization of which it is an affiliate or constituent unit. As in the case of paragraph 1(d), the requested modification made by the Board is too limited in nature and scope and paragraph 2(b), if to be enforced, it is submitted, should be modified not only to refer to the local Union but also to "any national and international labor organization of which it is an affiliate or constituent unit."

As originally made, the Order directs respondents to: "Post at their plant at Los Angeles, California, copies of the notice attached hereto, marked 'Appendix A'" at cer-

tain places and for a prescribed period of time. [R. I., p. 184—par. 2(c) Order.] The Board has requested that this portion of its Order be modified in two respects: (1) that the prescribed notice, "Appendix A", be modified [R. I., p. 202] by inserting therein the words "by threat of reprisal or force or promise of benefit"* and (2) by inserting in paragraph 2(c) after the words "notice attached hereto" the following phrase: "provided that said labor organization, and any national or international labor organization of which it is an affiliate or constituent unit, shall have complied, within thirty (30) days from the date of the decree enforcing the Board's order, with Section 9(f) (g) and (h) of the National Labor Relations Act, as amended." [R. I., pp. 203-204.] The request by the Board for modification in this latter respect apparently also asks for modification of the prescribed Notice (by insertion of the same phrase), although no posting whatever would be required until compliance by said organizations. It is submitted that the Notice, if one be required to be posted after compliance with the Act, as amended, by the Local and National CIO organizations, should not be so modified.

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*The Board states that its request in this regard is made "in order to conform with the requirements of Section 8(c) of the Act, as amended." However, as in the case of the request for modification of paragraph 1(a) of the Order, discussed *supra* subdivision "1" of this Point, the requested modification fails to cause a conformance with said Section 8(c) of the Act. In order to cause conformance with the statute, if this portion of the Order is to be enforced, it is submitted that the prescribed notice should be modified by adding to the end of the third subparagraph of said Notice the following phrase: "but, as provided by law, we have and retain the right to the expressing of any views, argument, or opinion, and of the dissemination thereof, whether in written, printed, graphic, or visual form, if such expression contains no threat of reprisal or force or promise of benefit."

Under the modifications suggested by the Board, there is no means provided whereunder respondents or any of them would know whether either Local 1981, CIO, or the National or both have complied with the Board's requested conditions. It is submitted that, if a decree of enforcement is made conditional upon compliance within 30 days by said labor organizations with the law, the condition also properly should be inserted therein requiring said labor organizations to give respondents notice of the time of such compliance.

For the reasons first above stated, however, it is submitted that paragraphs 1(d) and 2(b) and 2(c) should be refused enforcement by reason of the CIO, local and national, organizations' refusal to comply and positive assertion that neither will comply with the Act as amended.

Conclusion.

For the foregoing reasons and each of them it is respectfully submitted that the Petition for Enforcement should be denied in its entirety; that if any portion or part of the Board's Order be deemed enforceable such may and should not be enforced against any individual respondent who was not properly before the Board nor against the separate partnership entity; and that if any portion or part of the Board's Order be deemed enforceable such portion or part should be modified in accordance with the suggestions therefor made in this Brief.

Respectfully submitted,

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